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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

NATIVIDAD RAMIREZ, Plaintiff and Appellant, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant and Respondent.	A151552 (San Francisco County Super. Ct. No. CGC15547325)

Natividad Ramirez sued her former employer, the District Attorney's Office for the City and County of San Francisco (the City), alleging age discrimination and failure to prevent discrimination in violation of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940, subds. (a), (k)), and wrongful termination in violation of public policy. The trial court granted the City's motion for summary judgment on all causes of action. Ramirez now appeals, arguing there were triable issues of fact on her age discrimination claim. We will affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize those facts that are relevant to the dispositive issues on appeal. In accordance with our standard of review of orders granting such motions, we accept as true only those portions of the moving party's evidence that are uncontradicted by the opposing party. (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.)

Ramirez's Employment with the City

Ramirez began working for the district attorney's office in 1985 as an investigator in the Family Support Bureau. In 2008, she was promoted to Assistant Chief Victim/Witness Investigator and Director of the Subpoena Division, an exempt position. Her duties included serving as the subpoena liaison to the San Francisco Police Department and monitoring the status of officer subpoenas. Her employment was at-will and at the pleasure of the district attorney.

The district attorney's office maintains a "Statement of Incompatible Activities" that provides, in part: "No employee may engage in outside activity (regardless of whether the activity is compensated) that would cause the employee to be absent from his or her assignments on a regular basis, or otherwise require a time commitment that is demonstrated to interfere with the employee's performance of his or her City duties." The Statement of Incompatible Activities allows employees to get an advance written determination whether or not a proposed activity is compatible. It asserts that engaging in prohibited activities can subject an employee to discipline, including termination.

The district attorney's office also has an "Employee's Guide to Office and Personnel Policies" that asserts the normal workweek consists of "forty (40) hours consisting of five consecutive days encompassing eight (8) hours of work completed within not more than nine (9) hours. Normal office hours are 8 a.m. to 5 p.m. . . . Each employee is also entitled to two 15-minute rest periods, one in the morning and one in the afternoon. . . . [I]t is not appropriate . . . to skip breaks in order to lengthen a lunch break." It further provides: "Other than for standard breaks, lunch, and scheduled time off . . . all office employees . . . should advise their supervisor when they are leaving the office during the work day, where they are going and when they expect to return." Moreover, it states: "Employees are required to maintain a daily, accurate accounting of time worked." Ramirez knew about this guide, knew about normal office hours and the 40-hour work week, and understood she had to accurately account for the time she worked and could not claim to work time she did not.

Ramirez's Time at Don Ramon's

From the beginning of her employment with the district attorney's office, Ramirez typically ate lunch at her family's restaurant, Don Ramon's. She sometimes described herself as the "co-owner" of the restaurant. While there, Ramirez occasionally performed work-related tasks, such as meet with police officers to deliver subpoenas and answer questions, or meet with police authorities to discuss subpoena-related issues. She would also help her family at the restaurant, e.g., by greeting customers, helping in the kitchen, and overseeing employees.

Ramirez did not keep track of her time away from her office and at Don Ramon's, but generally left her office around noon, and returned around 1:30 p.m. or 1:45 p.m. On most days, during the middle of the work day, Ramirez was at Don Ramon's, not the district attorney's office. Ramirez never reported her practice of going to Don Ramon's during the work day to her acting supervisors and never obtained explicit permission for these midday trips to the restaurant. She did not obtain written approval from the district attorney's office for the restaurant work she performed. She submitted certified time sheets claiming to have worked eight hours a day for the district attorney's office when she had not in fact done so.

The District Attorney's Investigation and Termination of Ramirez

In 2014, the district attorney's office began investigating Ramirez for wage theft and absenteeism after District Attorney George Gascon overheard police officers gossiping about his office selectively prosecuting an individual police officer for time theft while Ramirez, his own employee, spent time at Don Ramon's rather than work. For several days in late April and early May 2014, and later from the middle to the end of May 2014, investigators from the district attorney's office surveilled Ramirez and found she spent significant amounts of time, about two or three hours, away from her desk and at Don Ramon's during normal office hours. On her time sheet for many of these days, Ramirez reported working eight hours per day.

On July 29, 2014, an investigator from the district attorney's office gave Ramirez a letter stating they were investigating her time and attendance. On August 7, 2014,

Ramirez met with an investigator at the district attorney's office, Matthew Irvine, among others. During the interview, after Irvine confronted Ramirez with what the investigators' surveillance revealed, Ramirez admitted she generally spent two to two and a half-hours, four to five times a week, at Don Ramon's while she was paid to be at the district attorney's office, without taking "comp" or holiday leave. She also acknowledged she did not work eight hours a day as she reported on her time sheet, and even though she sometimes came in early or stayed late, "the math doesn't add up." Moreover, she admitted she never informed anyone or sought approval for this routine practice, and she would sometimes use sick leave in order to work at the restaurant.

On August 26, 2014, the district attorney's office terminated Ramirez. Ramirez was 59 years old when she lost her job. After her termination, several staff members within the district attorney's office, with ages ranging from their early thirties to late forties, absorbed many of Ramirez's former responsibilities.

Trial Court Proceedings

Ramirez sued the City, alleging age discrimination and failure to prevent discrimination in violation of the FEHA (Gov. Code, § 12940, subds. (a), (k)), and wrongful termination in violation of public policy.

The City moved for summary judgment on all of Ramirez's causes of action. It claimed the cause of action for wrongful termination in violation of public policy could not be made against a public agency and, in any event, Ramirez failed to present a government claim. The City also alleged the FEHA claims failed because Ramirez could not establish a prima facie case of age discrimination, and even if she could, the City's actions were taken for legitimate, nondiscriminatory reasons. The trial court granted summary judgment on all counts.

DISCUSSION

I. The Trial Court Properly Granted Summary Judgment on Ramirez's FEHA Claims

A. Governing Law and Standard of Review

Under the FEHA, it is unlawful for an employer to discriminate against a person because he or she is over 40 years old. (Gov. Code, §§ 12926, subd. (b) & 12940, subd.

(a).) In the context of summary judgment pertaining to claims of discrimination under the FEHA, "an employer may satisfy its initial burden of proving a cause of action has no merit by showing *either* that one or more elements of the prima facie case 'is lacking, *or* that the adverse employment action was based on legitimate nondiscriminatory factors.' " (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1181–1182, italics added.)

Generally, "a prima facie case, of age discrimination arises when the employee shows (1) at the time of the adverse action he or she was 40 years of age or older, (2) an adverse employment action was taken against the employee, (3) at the time of the adverse action the employee was satisfactorily performing his or her job and (4) the employee was replaced in his position by a significantly younger person." (*Hersant v. Department of Social Services, supra,* 57 Cal.App.4th at p. 1003, fn. omitted.) " ' " 'If the employer presents admissible evidence . . . that one or more of plaintiff's prima facie elements is lacking, . . . the employer will be entitled to summary judgment unless the plaintiff produces admissible evidence which raises a triable issue of fact material to the defendant's showing.' " ' " (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 309, italics omitted.)

"In meeting its initial burden the employer need not rely upon the premise that the plaintiff cannot demonstrate a prima facie case if the employer can set forth admissible evidence of its reasons, unrelated to unlawful discrimination, for the adverse employment action." (*Hicks v. KNTV Television, Inc.* (2008) 160 Cal.App.4th 994, 1003.) "[T]he employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the termination." (*Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097–1098.)

Where an employer sets out evidence of a nondiscriminatory reason for the adverse employment action, the employee must "present evidence that the employer's decision was motivated at least in part by prohibited discrimination. [Citation.] The plaintiff's evidence must be sufficient to support a reasonable inference that

discrimination was a substantial motivating factor in the decision. [Citations.] The stronger the employer's showing of a legitimate, nondiscriminatory reason, the stronger the plaintiff's evidence must be in order to create a reasonable inference of a discriminatory motive." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1158–1159, fn. omitted (*Featherstone*).)

"In determining whether these burdens were met, we must view the evidence in the light most favorable to plaintiff, as the nonmoving party, liberally construing [plaintiff's] evidence while strictly scrutinizing defendant's." (*Kelly v. Stamps.com Inc.*, *supra*, 135 Cal.App.4th at p. 1098.) "Although an employee's evidence submitted in opposition to an employer's motion for summary judgment is construed liberally, it 'remains subject to careful scrutiny.' [Citation.] The employee's 'subjective beliefs in an employment discrimination case do not create a genuine issue of fact; nor do uncorroborated and self-serving declarations.' [Citation.] The employee's evidence must relate to the motivation of the decision makers and prove, by nonspeculative evidence, 'an actual causal link between prohibited motivation and termination.' " (*Featherstone*, *supra*, 10 Cal.App.5th at p. 1159.) " '[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. [Citations.] While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*.' " (*Id.* at pp. 1159–1160.)

On appeal from a grant of summary judgment, we review the record de novo. (*Hersant v. Department of Social Services*, *supra*, 57 Cal.App.4th at p. 1001.) "[W]e accept as undisputed fact only those portions of the moving party's evidence that are uncontradicted by the opposing party. In other words, the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences that can be drawn therefrom are accepted as true." (*Ibid.*)

B. The Trial Court Properly Granted Summary Judgment on Ramirez's Age Discrimination Claim

We need not decide whether Ramirez carried her burden of proving a prima facie case for age discrimination because her cause of action fails for a different reason. (See, e.g., *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 357 (*Guz*).) Namely, the City presented extensive evidence it terminated Ramirez, not because of her age, but because she was spending several hours during regular office hours, on multiple days, at Don Ramon's and she admitted filling out her time sheets inaccurately for the district attorney's office. These reasons are facially unrelated to Ramirez's age. (*Id.* at p. 358.) Accordingly, the City was entitled to summary judgment unless Ramirez presented evidence from which a trier of fact could rationally infer the City engaged in intentional age discrimination. (*Id.* at pp. 357, 361.) Ramirez failed to present any such evidence.

Ramirez first alleges the City's reasons for firing her "shift[ed]" over time, evidencing pretext. In support, Ramirez points to the City's August 26, 2014 termination letter that stated, "your services will no longer be needed." Ramirez alleges the City's reasons "shift[ed]" because when it responded to discovery, the City asserted Ramirez was fired due to " 'wage theft,' " and then in its reply to Ramirez's opposition to the summary judgment motion, the City said she was fired due to " 'incompatible activities.' "

However, the allegedly "shifting" reasons provided by the City in its discovery response and reply papers were not materially different. An employer's reasons for termination are not considered "shifting" where, viewing the record, the reasons are unanimous in substance and not incompatible. (See *Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 815.) Here, in response to an interrogatory asking for its reasons for terminating Ramirez, the City asserted she was fired after an investigation bore out that she "engaged in outside work during core business hours of the [district attorney's] Office," "engaged in incompatible activities that caused her to be absent from work on a regular basis, . . . engaged in additional employment during her regular City work schedule without permission, and . . . submitted signed timesheets that

she knew were not accurate." Moreover, in its reply to Ramirez's opposition to the summary judgment motion, the City said Ramirez was fired because of the amount of time she spent at and traveling to and from Don Ramon's during regular office hours, and because she admitted she took sick leave to work at Don Ramon's and her time sheets were inaccurate. These reasons for termination pertain to a single central theme: the misconduct surrounding Ramirez's outside work at Don Ramon's during regular office hours.

As for her termination letter stating, "your services will no longer be needed," Ramirez urges this was a different reason for her firing than her improper conduct in relation to her time spent at Don Ramon's. Ramirez suggests this reason is "demonstrably false" based on evidence that several district attorney's office employees absorbed Ramirez's duties and the subpoena department encountered some difficulty keeping up with the workload after her termination. Her argument is meritless.

"[I]n an appropriate case, an inference of dissembling *may* arise where the employer has given shifting, contradictory, implausible, uninformed, or factually baseless justifications for its actions." (*Guz, supra,* 24 Cal.4th at p. 363, italics added.) That said, "an inference of intentional discrimination cannot be drawn solely from evidence, if any, that [an employer] lied about its reasons. The pertinent statutes do not prohibit lying, they prohibit discrimination. [Citation.] Proof that the employer's proffered reasons are unworthy of credence may 'considerably assist' a circumstantial case of discrimination, because it suggests the employer had cause to hide its true reasons. [Citation.] Still, there must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions. [Citation.] Accordingly, the great weight of federal and California authority holds that an employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Id.* at pp. 360–361.)

Here, considering the record as a whole and the extensive evidence the City presented of its nondiscriminatory reasons for terminating Ramirez, the termination

letter's allegedly false or shifting explanation for why the City fired Ramirez is wholly insufficient to permit a rational inference the City's actual motive was age discrimination. Ramirez was employed at the will and pleasure of the district attorney, which the letter noted. The termination letter came on the heels of a lengthy investigation into the time Ramirez spent during the work day at Don Ramon's and the way she recorded her time on her timesheets. During this investigation, Ramirez admitted the truth of the proffered nondiscriminatory reasons for her termination. She acknowledged she did not work eight hours a day despite reporting she did on her time sheet and, even though she sometimes came in early or stayed late, "the math doesn't add up." Moreover, she asserted she never informed anyone or sought approval for what she was doing, and she would sometimes use sick leave in order to work at the restaurant. Given the record, no fact finder could reasonably infer the termination letter's allegedly disparate reason for Ramirez's termination raises an inference of discriminatory motive. (*Guz*, *supra*, 24 Cal.4th at pp. 361–362.)

Ramirez makes other arguments about why the reasons the City gave for firing her were false and pretextual. She claims the City's assertion she engaged in any time theft are meritless as she "consistently worked more than 40 hours/week," "consistently worked early mornings, evenings and weekends—all outside the standard 8a-5p workday" and she was an "exempt" employee, meaning that she could not earn overtime or be " 'docked' for failure to work for 40 hours (or any number less than 40) in any week." The problem with this argument is, as discussed above, when investigator Irvine confronted her about spending office hours at Don Ramon's and falsifying her time sheets, she admitted the misconduct.

Ramirez *now* produces evidence that could support a triable issue concerning whether the City was correct in believing she was stealing time and not properly accounting for time, but she does not tether this to what the decision maker knew at the time of her termination. (See *Featherstone*, *supra*, 10 Cal.App.5th at p. 1159 ["The employee's evidence must relate to the motivation of the decision makers and prove, by nonspeculative evidence, 'an actual causal link between prohibited motivation and

termination' "].) Instead, the record shows Ramirez never told anyone in the district attorney's office the specifics about her time at Don Ramon's, she never asked or obtained permission to go to Don Ramon's for several hours during the work day, and none of District Attorney Gascon's managerial staff knew the specifics of her practice of going to Don Ramon's for several hours in the middle of the day. As such, a trier of fact could not reasonably infer the City's nondiscriminatory reason for terminating Ramirez is implausible, uninformed, or factually baseless such that the City did not act for the asserted nondiscriminatory reasons. (*Guz, supra*, 24 Cal.4th at p. 363; *Featherstone*, at p. 1159.) For the same reasons, Ramirez's argument that her conduct did not violate the office's "Statement of Incompatible Activities" fails.

Ramirez attempts to bolster her claim of age discrimination by arguing the district attorney's investigation into her time at Don Ramon's was "deeply flawed" because: (i) "[District Attorney George] Gascon initiated a secret investigation of her work practice based on an anonymous, uncorroborated hearsay conversation he allegedly heard between several police officers, whose names and identifying details he failed to ascertain"; (ii) "Gascon ostensibly had no idea of Ramirez's duties and functions, insisting that she was required to remain in her office the entire workday, and conceding that he never reviewed her Performance Evaluations"; (iii) "Gascon failed to obtain a conflict waiver from the state AG" before investigating one of his own employees; (iv) "the investigation was itself excessive and faulty" because "seven . . . investigators . . . shadowed Ramirez over several weeks, a huge commitment of resources, but focused on her lunchtime, . . . but never looked at what work she did before and after the standard work day. Moreover, because the investigators had little knowledge of Ramirez's responsibilities or work practice, they had no basis on which to evaluate what they observed"; and (v) the July 29, 2014 letter the district attorney's office used to notify Ramirez that she would be questioned by Irvine falsely stated there were reports she routinely engaged in non-City activities during the work day because "the only 'report' came from Gascon's overheard conversation, left anonymous, unverifiable

and unexaminable by his failure to follow standard police practices in getting the officers' identity."

Without addressing the validity of the alleged flaws in the investigation, none of them, even if true, rationally supports an inference that Ramirez was terminated due to her age. (See *Merrick v. Hilton Worldwide, Inc.* (9th Cir. 2017) 867 F.3d 1139, 1148–1150 [" 'A plaintiff may . . . raise a triable issue of pretext through evidence that an employer's deviation from established policy or practice worked to her disadvantage.' [Citations.] But such a deviation must be considered in context and may not always be sufficient to infer a discriminatory motive. [Citations.] [¶] . . . [¶] '[T]here [still] must be evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions' "].) "Any investigation can be criticized, and a plaintiff can always assert that more should have been done, or done differently." (*Jameson v. Pacific Gas & Electric Co.* (2017) 16 Cal.App.5th 901, 912.) Here, the City's evidence on summary judgment showed numerous investigators surveilled Ramirez for weeks resulting in two detailed reports containing their findings. Ramirez was informed of the substance of the investigation and directed to speak to investigator Irvine about a week and a half later. When confronted with the investigation's findings and given a chance to respond, she admitted to misconduct. Ramirez's criticisms of the investigation do not support a reasonable inference that the City relied on the investigation's findings in bad faith as a veil for age discrimination.

In sum, Ramirez has not carried her burden of presenting evidence supporting a reasonable inference that age discrimination motivated the City's decision to terminate her. (See *Guz*, *supra*, 24 Cal.4th at p. 362.) The trial court therefore did not err in granting summary judgment on her age discrimination claim and her claim for failure to prevent discrimination. (*Featherstone*, *supra*, 10 Cal.App.5th at p. 1166 ["Where, as here, a plaintiff cannot establish a claim for discrimination, the employer as a matter of law cannot be held responsible for failing to prevent same"].)

II. The Trial Court Properly Granted Summary Judgment on Ramirez's Cause of Action for Wrongful Termination in Violation of Public Policy

Finally, Ramirez asserts, in passing, that she is appealing from the trial court's grant of summary judgment on her common law wrongful discharge claim. " ' " '[Appellate] review is limited to issues which have been adequately raised and briefed.' " ' " (*Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 913.) Here, the trial court explained it was granting summary judgment on this cause of action because such a claim cannot be asserted against a public entity. Ramirez does not address the trial court's rationale in her briefing or cite authority controverting it. As such, Ramirez forfeited this claim.

DISPOSITION

The judgment is affirmed. The City shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

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Jones, P.J.

WE CONCUR:

_____
Simons, J.

_____
Burns, J.

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